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In The

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC. and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AS IMPROVIDENTLY GRANTED

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13 pp

TABLE OF CONTENTS

Page

BACKGROUND AND COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 6

I. THIS ACTION UNQUESTIONABLY PRESENTS A CASE OR CONTROVERSY WHERE THIS COURT'S DECISION WILL HAVE REAL MEANING TO THE RESOLUTION OF A DISPUTED ASSERTION OF RIGHTS BY PETITIONERS 6

II. RESPONDENTS' ARGUMENTS REGARDING THE AVAILABILITY OF A CLAIM FOR REIMBURSEMENT UNDER ERISA DO NOT COUNSEL AGAINST THIS COURT'S REVIEW OF THE NINTH CIRCUIT DECISION AT ODDS WITH THOSE ARGUMENTS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Independent Automobile Dealers Assoc. of Cal. Health & Ben. Plan, 64 F.3d 1389 (9th Cir. 1995) 3

Cardinal Chemical Co. v. Morton International, Inc., 508 U.S. 83 (1993) 7

Cement Masons Health and Welfare Trust Fund for Northern California v. Stone, 197 F.3d 1003 (9th Cir. 1999) 3, 4

Cleveland v. Chamberlain, 66 U.S. 419 (1861) 7

FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) 1, 3, 4, 5, 9

Muskrat v. United States, 219 U.S. 346 (1911) 8

Reynolds Metals Co. v. Ellis, 202 F.3d 1246 (9th Cir. 2000) 4

South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co., 145 U.S. 300 (1892) 7

Toibb v. Radloff, 501 U.S. 151 (1991) 9

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993) 7, 8

STATUTES

29 U.S.C. § 1132(a)(3) ..... *passim*

29 U.S.C. § 1132(e)(1) 6

29 U.S.C. § 1132(g)(1) 1

Fed. R. Civ. P. 12(b)(1) 4

Fed. R. Civ. P. 12(b)(6) 4

Supreme Court Rule 15.4 ..... 2, 9

BACKGROUND AND COUNTERSTATEMENT OF THE CASE

In July, 1997, Petitioners filed the present action against Respondents (the "Knudsons") in the United States District Court for the Central District of California alleging a claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Petitioners sought to recoup, from Respondents' state-court third-party tortfeasor recovery, $411,157.11 in medical benefits that they had advanced to Respondents.[1] After the parties filed cross-motions for summary judgment, the district court granted summary judgment in favor of the Knudsons, awarding Petitioners only $13,828.70 (5% of the settlement less attorney's fees), the amount which Respondents' state-court settlement had allocated to medical expenses.[2] (Order Granting Defendants' Motion For Summary Judgment, Pet. App. C-1.) The district court also awarded the Knudsons $80,497.50 in attorney's fees pursuant to 29 U.S.C. § 1132(g)(1).

Petitioners appealed to the Ninth Circuit, asserting that multiple errors required that the district court's decision be reversed and judgment entered in their favor. Petitioners also asserted that the federal court had subject matter jurisdiction over their reimbursement action, notwithstanding the recent decision of the Ninth Circuit in *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997), to the contrary. Without considering the district court's basis for its decision, the Ninth Circuit declined the invitation to overturn *Owens*, after which this Court, by

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[1] The ERISA plan provided for first-lien reimbursement of medical expenses recovered from third parties. (Pet. App. C-3.)

[2] Petitioners were not parties to the state-court action.

Order dated January 22, 2001, granted certiorari to resolve a conflict among the federal courts of appeal.

Respondents have moved to dismiss as improvident the Court's grant of certiorari, asserting "there is no case or controversy." (Respondents' Mot. at 1.)[3] Knudsons' arguments fall into two categories: the first being jurisdictional arguments that the Court lacks the "power to hear this case," and the second being merits arguments stressing (in agreement with Petitioners) that § 502(a)(3) of ERISA provides Petitioners with the very cause of action that the Ninth Circuit rejected. Before reaching those arguments, however, Petitioners will address two misstatements by the Knudsons regarding the Ninth Circuit proceedings, as those misstatements infect virtually all of the Respondents' legal arguments.

Foremost of these misstatements is the Knudsons' contention that the Ninth Circuit issued what would amount to an advisory opinion by deciding not only that no ERISA § 502(a)(3) claim was available to Petitioners, but also actually affirmed the district court's reasoning on the merits of that claim. The Knudsons reason that if this is so, then this Court's ruling on the existence of a claim

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[3] Supreme Court Rule 15.4 provides that "[a]ny objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition [to a petition for a writ of certiorari]." Respondents, in fact, in opposing certiorari previously argued there was no "case or controversy" between the parties. (Appellee Janette Knudson's Answering Br. at 40-41.) Knudsons' Motion, which rehashes and expands on that argument, while adding nothing that could not have been earlier addressed, in essence disregards Rule 15.4 and wastes both the Court's and the parties' resources.

under § 502(a)(3) is superfluous to the ultimate outcome, because the Ninth Circuit's "merits determination" would in any event resolve the case. This contention badly misinterprets the Ninth Circuit's holding. The Ninth Circuit expressly did not review the substantive merits of the district court's decision.

Although the district court did grant summary judgment on the merits of Petitioners' § 502(a)(3) claim, the Ninth Circuit carefully avoided addressing the multiple grounds of error that Petitioners advanced on appeal for reversal of summary judgment.[4] Instead the court stated: "We affirm the district court's judgment ***but do so on grounds different from those relied on by the district court.***" (Pet. App. A-2 (emphasis added).) The ***only*** ground that it then gave for its affirmance was its holding in *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1262 (9th Cir. 1997), that a claim for reimbursement of payments made to a plan beneficiary by a third party is not equitable relief under § 502(a)(3). (Pet. App. A-3, 4.) In so holding, the Ninth Circuit, in footnote 5 of its memorandum opinion, addressed a point at the root of Respondents' contention that the Ninth Circuit decided "the merits" of Petitioners' § 502(a)(3) claim:

> *Owens* rests its dismissal on the lack of subject matter jurisdiction. *But see Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999) (reaffirming the substantive holding in *Owens*

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[4] Review of the district court's summary judgment decision would have been governed by a *de novo* standard. *Barnes v. Independent Automobile Dealers Assoc. of Cal. Health & Ben. Plan*, 64 F.3d 1389 (9th Cir. 1995).

> but dismissing on the merits rather than on subject matter jurisdiction). For our purposes, in evaluating the substantive holding of *Owens* requiring the dismissal of reimbursement claims for third party settlements under ERISA, ***the dismissal could be based either on lack of subject matter jurisdiction or on the merits.***

(Pet. App. A-4 (emphasis added).)

On its face, this language reflects that the Ninth Circuit was stating nothing more than that its holding in *Owens*, which rejects the availability of a § 502(a)(3) claim for reimbursement, could be viewed as a dismissal on either a jurisdictional basis under Rule 12(b)(1), Fed.R.Civ.P., or on a "merits" basis for failure to state a claim for relief under Rule 12(b)(6), Fed.R.Civ.P. This is the very point for which *Cement Masons* is cited. The term "merits" as used in footnote 5 does not refer to the substantive issues of the case. Rather, it refers only to whether a claim had been stated upon which relief could be granted. Moreover, the identical footnote, authored by the same panel as here, is found in *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1248 n.2 (9th Cir. 2000). In *Ellis*, however, because the district court dismissed the case on a pre-answer motion (on the basis of *Owens*), there was no substantive merits determination that the Ninth Circuit was even asked to address. Accordingly, its statement in *Ellis* that "the dismissal could be based either on lack of subject matter jurisdiction or on the merits" necessarily refers solely to the resolution of the legal issue of whether a claim was available under ERISA. The panel's use of the identical language in *Knudson*, therefore, can

hardly be taken as reflecting an entirely different analysis – i.e., addressing the substance of the § 502(a)(3) claim.

Respondents also suggest that Petitioners' raising of the *Owens* decision in the Ninth Circuit was somehow inappropriate. (Mot. at 4.) As the Knudsons concede, however, Petitioners raised *Owens* (as they were obliged to do) in attempting to persuade the Ninth Circuit to permit Petitioners to ***enforce*** their claim for reimbursement under § 502(a)(3). (Mot. at 2.) The suggestion that this unsuccessful entreaty to the Ninth Circuit somehow precludes Petitioners from seeking this Court's review of the Ninth Circuit's denial is nonsensical.[5]

In summary, Petitioners seek a reversal in this Court on the issue presented in order to have the Ninth Circuit address the merits of the district court's decision – something it did ***not*** do.

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[5] Respondents boldly assert what the position of the United States Solicitor General would have been had Respondents earlier declared they would not change sides on the issue before the Court. (Mot. at 2-3.) Aside from being speculation, as demonstrated *infra* at Argument I, there is no constitutional reason why Respondents' decision not to file an opposing brief would deprive this Court of the ability to resolve the conflict in the courts of appeal presented in this case.

ARGUMENT

I.

THIS ACTION UNQUESTIONABLY PRESENTS A CASE OR CONTROVERSY WHERE THIS COURT'S DECISION WILL HAVE REAL MEANING TO THE RESOLUTION OF A DISPUTED ASSERTION OF RIGHTS BY PETITIONERS

Respondents confuse the parties' lack of *dis*agreement on an issue as to which the federal courts of appeal are in conflict (and as to which this Court granted certiorari) with the lack of agreement over how the action should be finally resolved on the merits. True enough, both parties agree that the Ninth Circuit should have recognized Petitioners' right to bring a claim for relief under ERISA § 502(a)(3). Respondents' "stipulation" that the federal court had jurisdiction does not resolve this issue. The federal courts (and not the parties) have the right and obligation to determine whether they have been authorized to hear a case.

In this case, the Ninth Circuit's ruling bars the federal courthouse doors to such claims, depriving Petitioners of a federal right that Congress granted exclusive jurisdiction to the federal courts to hear. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). The state court result orchestrated by the Knudsons thus has been allowed to trump Petitioners' federal rights. Given this outcome in the Knudsons' favor, it is hardly surprising that they now concede that it would be contrary to their interests to support the grant of certiorari in this case (Mot. at 5), because certiorari is the only avenue for Petitioners to obtain redress under ERISA and reverse the outcome in the lower courts.

The Court has repeatedly recognized that agreement on the issue before it does not deprive the suit of Article III justiciability. For instance, in *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 88 n.9 (1993), the Court examined a practice of the Federal Circuit that prevented the Federal Circuit from reaching the underlying dispute regarding the validity of patents. Despite the parties' agreement that the Federal Circuit's position was wrong, the Court recognized that Article III concerns had been satisfied. *See also id.* at 104 (Scalia, J., concurring) ("I agree . . . that the parties' total agreement as to disposition of this case poses no constitutional barrier to its resolution."). The same situation presents itself here. Both sides agree that the Ninth Circuit should have recognized Petitioners' right to sue under § 502(a)(3). The Ninth Circuit's own position, however, prevented it from resolving the underlying dispute – i.e., whether Petitioners have enforceable federal rights that grant them a recovery other than that decided in the state court action in which Petitioners were not parties.[6]

This Court's ruling in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993), provides analogous support. There, the

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[6] The authority Respondents cite for their contention that their strategic choice not to file an opposing brief deprives this Court of the power to hear this matter is inapposite. For instance, one cannot question whether this matter is here as a result of collusion. *See, e.g., Cleveland v. Chamberlain*, 66 U.S. 419 (1861). Nor is this a scenario where one party has in the course of litigation acquired a controlling interest in its adversary. *See, e.g., South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.*, 145 U.S. 300 (1892).

Court recognized that the court of appeals had not been deprived of the constitutional power to determine the validity of an omitted section of the United States Code (section 92) even though section 92's validity had not been challenged despite the court of appeals having ordered supplemental briefing. *See id.* at 446. In rejecting the proposition that there was no case or controversy presented to the court of appeals about the validity of section 92, this Court emphasized that "from the start respondents' suit was the 'pursuance of an honest and actual antagonistic assertion of rights by one [party] against another,' that 'valuable legal rights . . . [would] be directly affected to a specific and substantial degree' by a decision on whether the Comptroller's ruling was proper and lawful, and that the Court of Appeals therefore had before it a real case and controversy extending to that issue." *Id.* at 446 (quoting *Muskrat v. United States*, 219 U.S. 346, 359 (1911)) (second alteration in original).

The Knudsons' attempt to distinguish *Bank of Oregon* is spurious. First, Respondents argue that the Ninth Circuit affirmed the "merits" of the lower court's judgment, which is simply not the case. (Mot. at 8.) Second, Respondents assert that "no meritable counter-argument" supports the Ninth Circuit's rejection of a claim for reimbursement under ERISA § 502(a)(3). *Id.* Castigating the Ninth Circuit's position that § 502(a)(3) does not provide Petitioners a cause of action for reimbursement should not immunize that very decision from this Court's review.

The Court, when recognizing that the agreement of the parties before it poses no constitutional barrier to resolution of an issue, has been prompted by prudential

concerns on at least some of those occasions to appoint *amici* to argue the unrepresented side of an issue. *See, e.g., Toibb v. Radloff*, 501 U.S. 151 (1991) (private member of bar appointed as *amicus curiae* to defend judgment of Court of Appeals after United States Trustee indicated his agreement with petitioner's position). While Petitioners believe that such a step is unnecessary for the Court to consider fully the merits of the issue on which certiorari has been granted, they respectfully urge the Court to appoint an *amicus* to argue the unrepresented side, if the alternative is dismissal of certiorari.

II.

RESPONDENTS' ARGUMENTS REGARDING THE AVAILABILITY OF A CLAIM FOR REIMBURSEMENT UNDER ERISA DO NOT COUNSEL AGAINST THIS COURT'S REVIEW OF THE NINTH CIRCUIT DECISION AT ODDS WITH THOSE ARGUMENTS

The Respondents also make a number of arguments that essentially conclude that the Ninth Circuit's decision in *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997), is without merit.[7] (Mot. at Argument II, pp. 9-12.) As the rationale of that holding is precisely the issue raised in the question upon which certiorari has been granted, the Knudsons' firm conviction is all the more reason why the conflict in the courts of appeal created by *Owens* should be promptly resolved. As demonstrated

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[7] These merits arguments should be deemed waived by not having been raised in the Knudsons' opposition to certiorari. Supreme Court Rule 15.4.

above, and as determined in the grant of certiorari, this is clearly an appropriate case for so doing.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny Respondents' motion to dismiss the grant of certiorari as improvident.

Respectfully submitted,

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